Public Prosecutor v Thenegaran a/l Murugan

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–154 OF 2008 AND B-05–145 OF 2008
APANDI ALI, MOHTARUDIN BAKI AND HAMID SULTAN JJCA
21 MARCH 2013

Criminal Procedure — Appeal — Appeal against conviction — Lesser offence of culpable homicide to attract s 304(a) of the Penal Code — Sentencing — Whether conviction safe

Criminal Procedure — Charge — Amendment — Appeal by prosecution — Charge of s 302 of the Penal Code amended to s 304(a) of the same — Whether learned judge correct in amending charge — Whether sentence passed on amended charge of s 304(a) adequate

The present case concerned two appeals relating to the accused. One appeal was by the accused while the other was by the public prosecutor. The public prosecutor appealed against the decision of the learned judge who amended the charge of s 302 of the Penal Code ('Code') relating to the accused for murdering one Murali ('the second deceased') to s 304(a). It was the prosecution's complaint that the learned judge was wrong in amending the charge from s 302 of the Code to s 304(a) of the same Code; and that the sentence passed by the learned judge under the amended charge under s 304(a) of the Code was inadequate. The accused's appeal was concerning his conviction for the murder of one Raguram ('the first deceased), under s 302 of the Code; and his conviction for the murder of the second deceased, to lesser offence of culpable homicide to attract s 304(a) of the Code, for the purpose of sentencing. Briefly the facts were that three men were killed and three persons were charged for their murder namely, the accused, one Nagathevan ('Bontal') and one Sivan. The accused was charged for the murder of the first and second deceased by way of two separate charges. Sivan was also charged for the murder. Bontal was acquitted after the prosecution case. However, the accused and Sivan was asked to enter defence. The charge was amended to s 304(a) of the Code and Sivan was acquitted at the end of the prosecution case, and an appeal by the prosecution in respect of Sivan was struck out. In short, out of the three persons charged, only the accused was convicted for the death of the first and the second deceased and this appeal involved only the second deceased.

Held, allowing the appeal and setting aside the conviction and sentence:

(1) Section 299 of the Code deals with unlawful killing. For the killing to

warrant the death penalty, one of the criteria set out in s 300 must be satisfied in order for the accused to be punished under s 302 of the Code. However, if the prosecution cannot satisfy one of the provisos to s 300 but it is an unlawful killing as set out in s 299 and the defence had placed a credible defence of aggravating and/or mitigating factors as opposed to denial or alibi, than the punishment will have to be lesser than that of death penalty and in almost all cases of serious nature the punishment will have to be under s 304 of the Code or for lesser conduct or factor it may attract milder sentencing provision under the Code (see paras 18–19).

(2) The prosecution's failure to lead evidence through the other three witnesses whether they indeed saw the accused slashing the second deceased and/or causing the death of the second deceased will only show that the other three witnesses will not have witnessed the incident and in consequence cannot be corroborative of that issue. From the evidence it appeared more than three persons could have been involved in the killing of the victims. It was unsafe to sustain the conviction substantially based in the absence of any independent witness or any other corroborative evidence to support the assertion that it was the accused who had slashed the second deceased and caused his death (see paras 27–28 & 35).

[Bahasa Malaysia summary

Kes ini berkenaan dua rayuan berkaitan tertuduh. Satu rayuan adalah oleh tertuduh sementara satu lagi oleh pendakwa raya. Pendakwa raya merayu terhadap keputusan hakim yang bijaksana yang meminda tuduhan s 302 Kanun Kesekasaan ('Kanun') berkaitan tertuduh kerana membunuh seorang bernama Murali ('si mati kedua') kepada s 304(a). Adalah aduan pihak pendakwaan bahawa hakim yang bijaksana telah tersalah dalam meminda tuduhan daripada s 302 Kanun kepada s 304(a) Kanun yang sama; dan hukuman yang dikenakan oleh hakim yang bijaksana di bawah tuduhan pindaan di bawah s 304(a) Kanun tidak mencukupi. Rayuan tertuduh adalah berkenaan sabitannya untuk pembunuhan seorang bernama Raguram ('si mati pertama), di bawah s 302 Kanun; dan sabitannya untuk pembunuhan si mati kedua, kepada kesalahan kurang homisid salah untuk mengguna pakai s 304(a) Kanun, untuk tujuan hukuman. Secara ringkas fakta adalah bahawa tiga orang lelaki dibunuh dan tiga orang dituduh untuk pembunuhan mereka iaitu, tertuduh, seorang yang bernama Nagathevan ('Bontal') dan seorang yang bernama Sivan. Tertuduh dituduh untuk pembunuhan si mati pertama dan kedua melalui dua tuduhan berasingan. Sivan juga dituduh membunuh. Bontal dilepaskan selepas kes pihak pendakwaan. Walau bagaimanapun, tertuduh dan Sivan diminta memasukkan pembelaan. Tuduhan dipinda kepada s 304(a) Kanun dan Sivan dilepaskan di akhir kes pihak pendakwaan, dan rayuan oleh pihak pendakwaan berkaitan Sivan dibatalkan. Secara ringkas,

daripada tiga orang yang dituduh, hanya tertuduh disabitkan untuk kematian si mati pertama dan kedua dan rayuan ini hanya melibatkan si mati kedua.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman:

(1) Seksyen 299 Kanun berurusan dengan pembunuhan di sisi undang-undang. Untuk pembunuhan mewajarkan penalti hukuman mati, satu kriteria yang ditetapkan di dalam s 300 mesti dipenuhi supaya tertuduh dihukum di bawah s 302 Kanun. Walau bagaimanapun, jika pihak pendakwaan tidak dapat memenuhi salah satu daripada peruntukan di dalam s 300 tetapi adalah pembunuhan salah di sisi undang-undang seperti yang ditetapkan di dalam s 299 dan pembelaan telah memasukkan pembelaan tambahan dan/atau faktor-faktor pengurangan yang boleh dipercayai seperti bertentangan kepada penafian atau alibi, oleh itu hukuman adalah kurang daripada penalti hukuman mati tersebut dan hampir dalam kesemua kes yang bersifat serius hukuman adalah di bawah s 304 Kanun atau untuk mengurangkan tindakan atau faktor yang mungkin menarik peruntukan hukuman yang kurang di bawah Kanun tersebut (lihat perenggan 18–19).

(2) Kegagalan pihak pendakwaan untuk mengemukakan keterangan melalui tiga saksi-saksi lain sama ada mereka memang melihat tertuduh mengelar si mati kedua dan/atau menyebabkan kematian si mati kedua akan menunjukkan bahawa ketiga-tiga saksi yang lain tidak menyaksikan kejadian tersebut dan akibatnya tidak dapat menyokong isu tersebut. Daripada keterangan ia jelas lebih dari tiga orang mungkin terlibat dalam pembunuhan mangsa-mangsa tersebut. Adalah tidak selamat untuk mengekalkan sabitan secara substansial berdasarkan ketiadaan saksi bebas atau apa-apa keterangan sokongan lain untuk menyokong desakan bahawa tertuduhlah yang mengelar si mati kedua dan menyebabkan kematian (lihat perenggan 27–28 & 35).]

Notes

For cases on amendment, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1208–1224.

For cases on appeal against conviction, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 207–215.

Cases referred to

Jandel Singh v State of Madhya Pradesh (2003) 2 LRI 609, SC (refd)

Kesar Singh & Anor v State of Haryana (2009) 3 SCC 1193, SC (refd)

Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650, CA (refd)

Magendran Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)

Pramod Mandal v State of Bihar [2004] 4 LRI 24, SC (refd)

PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)

A *Tham Kai Yau & Ors v PP* [1977] 1 MLJ 174, FC (refd)
Yusof bin A Samad v PP [2000] 4 SLR 58, HC (refd)

Legislation referred to

Criminal Procedure Code s 348
B Penal Code ss 34, 96, 299, 300, 302, 304(a)

Munahyza bt Mustafa (Attorney General's Chambers) for the appellant.
Rajpal Singh (Samynathan & Co) for the respondent.

C **Hamid Sultan JCA (delivering judgment of the court):**

[1] Two appeals relating to the accused Thenegaran a/l Murugan ('Lobo') came for hearing on 23 January 2013. We heard them together and the one by
D the accused was allowed and the one by the public prosecutor was dismissed on the same day. This is our judgment.

[2] The public prosecutor's appeal is Appeal No B-05–154 of 2008 against the decision of the learned judge who amended the charge of s 302 of the Penal
E Code relating to Lobo for murdering Murali ('the second deceased') to s 304(a) of the same Code.

[3] The accused, Lobo's appeal is Appeal No B-05–145 of 2008 which relates
F to two matters:

(a) the conviction of Lobo for the murder of Raguram ('the first deceased'), under s 302 of the Penal Code; and

(b) the conviction of Lobo for the murder of Murali, to lesser offence of
G culpable homicide to attract s 304(a) of the Penal Code, for purpose of sentencing.

[4] It is well settled that it is in the hands of the trier of facts to assess the quality of evidence and to determine whether the evidence on record justifies a
H conviction. In so doing if the court orders an acquittal or conviction it cannot be set-aside by the appellate court unless it records a finding that the view taken by the trial court was not a possible reasonable view of the evidence on record (see *Pramod Mandal v State of Bihar (SC)* [2004] 4 LRI 24). The instant case is not one of acquittal but whether it was correct to reduce the charge and
I whether the conviction was safe.

[5] It must be noted that Lobo's appeal against conviction for the murder of Raguram was heard by another panel of the Court of Appeal on 3 September 2012 and full grounds of judgment had been delivered. The judgment of the

learned trial judge was upheld. The Lobo's appeal in this judgment only deals with the conviction of Lobo for the death of Murali.

[6] We must state at the outset that the learned trial judge had taken much pain to write an articulate judgment adumbrating on physical as well as psychological facts in unusual length to justify conviction and sentence and also to ensure that no gap is given for appellate interference (see *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650 (Civil Appeal No B-01–16 of 2010)). We will describe it as a speaking judgment, which needs no appellate interference in terms of the findings, save to say:

(a) the judgment in all aspects is a correct judgment but for Murali: upon hearing the submission of learned counsel for Lobo, we were unanimous to conclude that it is not safe to convict; and

(b) in respect of the prosecution's appeal we were also unanimous that the charge should not have been amended.

[7] We must make it clear here that had we not allowed Lobo's appeal in respect of the death of Murali, we would have sentenced Lobo to death under s 302 of the Penal Code. The important section of the Penal Code which requires consideration for the purpose of this appeal are ss 299 and 300 of the Penal Code:

> Section 299 Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely by such act to cause death, commits the offence of culpable homicide.
>
> Section 300 Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

BRIEF FACTS

[8] The brief facts of the case had been well adumbrated by the learned trial judge and for the purpose of these appeals it is suffice to summarise as follows:

(a) during a temple festival, three men were killed. They were Raguram, Murali and Thiagarajan ('Boy');

(b) three persons were charged for the murder of the three persons;

(c) Nagathevan ('Bontal') was charged for conspiring with others to commit murder resulting in the death of Raguram and Murali;

(d) Lobo was charged for the murder of Raguram and Murali by way of two separate charge;

(e) Sivan was charged for the murder of Boy;

(f) Bontal was acquitted after the prosecution case;

(g) Lobo and Sivan was asked to enter defence;

(h) in respect of Murali and Boy the charge was amended to s 304(a) of the Penal Code; and

(i) Sivan was acquitted at the end of the prosecution case, and an appeal by the prosecution in respect of Sivan was struck out.

[9] In essence out of the three persons charged, Lobo was convicted for the death of Raguram and Murali. Bontal and Sivan is no more in the picture. This appeal involves Murali only.

SUMMARY OF THE SCENE OF THE INCIDENT

[10]

(a) It was about middle of the night at a temple festival where the incident happened;

(b) the accused, victim and the relevant witnesses by and large are known to each other and some of witnesses were related to and/or had some nexus to the victims;

(c) the accused and victims were dancing in front of the temple and/or were within the crowd which was dancing;

(d) there is medical evidence to say that the victims were in the state of intoxication;

(e) Lobo was seen attacking Raguram with the knife which caused his death;

(f) when Murali attempted to assist Raguram from being killed, Lobo is said to have slashed Murali which caused his death;

(g) when Boy was attempting to assist Murali, Sivan was said to have assaulted Boy which caused his death;

(h) the assault took place at the incident and that too within few minutes and it was said to be that more than three accused could have been involved in the attack; and

(i) the victims were pronounced dead subsequent to the event only.

THE DPP'S COMPLAINT

[11] The learned deputy public prosecutor's complaint can be summarised as follows:

(a) the learned judge was wrong in amending the charge from s 302 of the Penal Code to s 304(a) of the same Code; and

(b) inadequacy of sentence passed by the learned judge under the amended charge under s 304(a) of the Penal Code.

[12] In the instant case the defence was a mere denial and that part of the evidence, inter alia, is reproduced by the learned deputy public prosecutor and reads as follows:

> Lobo went on to explain that there was one group of people dancing in front of the tent, ie. in front of the temple, and another group on the main road where the chariot would eventually travel. He suddenly heard shouts from several people to the effect of 'Fight! Fight!' in the Tamil language. The crowd which had now swelled considerably started to panic and people started running in all directions. According to Lobo, as he looked back, he saw that persons wearing full-face helmets had penetrated the crowd that was dancing along the main road where the chariot would eventually travel, which was perpendicular to the Mariamman temple. When he was this, Lobo and Anbarasu then immediately left the area by walking towards the right, past the Mariamman temple. Lobo maintained that he did not know what happened to Bontal, Sivan and Boy or anyone else that night as he left the area immediately upon hearing that a fight had started. Lobo went home to bed and on the following day maintained his normal routine at home.
>
> In the following days, Lobo was informed by his father that his picture had been published in the newspapers linking him to the deaths of the victims. He therefore took his father's advice and presented/gave himself up to the police on 24 September 2004, whereupon he was remanded. An identification parade was held on 2 October 2004. According to Lobo, one hour before the identification parade, ASP Othman, SP21, took Bontal and Lobo to an office where SP5, Datchinamoorthy, SP2 Vinod, SP3 Maran, one of the victims' and another person were present. Then, Lobo testified, ASP Othman told the two relatives of the victim that he and Bontal were responsible for the death of their relatives, Murali. Lobo and Bontal were then taken back to their cells and the identification parade commenced an hour later.

[13] It is well settled that the nature of injury as well as the mode to cause the injury as well as the force used to cause the injury will be a determining factor for the court to determine whether s 300 will or will not apply. For example, (i) if a person just slaps the victim and the victim dies, it may not attract s 300.

However, if repeated slapping has caused the death it is likely to attract s 300. (iii) if death is caused by attacking brutally with a knife or attacking with firearms it will attract s 300. There is abundance of literature in this area of jurisprudence. The legal manner of analysing murder and culpable homicide not amounting to murder is well articulated in the Indian Supreme Court case of *Kesar Singh & Anor v State of Haryana* (2009) 3 SCC 1193. Two passages from the learned author Nandi on *Criminal Ready Refencer* (3rd Ed), 2012 in our view will stand as a useful guide. The said paragraph at Vol 3 p 614 reads as follows:

> Culpable homicide
>
> Scope
>
> The section defines the offence of culpable homicide. The essential pre-requisite of the offence is the death of a human being by a human being. According to the Supreme Court decision of *Akram v Seikh* AIR 1964 SC 1263; (1964) 2 Cr LJ 350, the causing of death of a person accompanied by intention expressed in two different ways or with the knowledge as mentioned in the section is distinguishable from cases of death resulting from rash or negligent act, or from hurt, grievous or simple. Once it is proved that the act was deliberate, and not the result of accident or negligence, the offence committed was culpable homicide.
>
> If a person willfully drives a motor car into the midst of a crowd and thereby causing death of some person, it will not be case of rash or negligent driving, but the act will amount to culpable homicide - *State v Haidar Ali* AIR 1976 SC 1012; 1976 Cr LJ 732.
>
> Where death was not proved to have been intended, neither sec 299 (1st or 2nd part), nor sec 300 would be attracted. But where there was the knowledge that the act was likely to cause death, 3rd part of sec 299 would be attracted - *Laxman v State* AIR 1968 SC 1390.
>
> Ingredients
>
> Culpable homicide may be classified in three categories:
>
> (1) in which death is caused by the doing of an act with the intention of causing death?
>
> (2) when it is committed by causing death with the intention of causing such bodily injury as is likely to cause death; and
>
> (3) where the death is caused by an act done with the knowledge that such act is likely to cause death.
>
> A note of caution at this juncture must be stated. Knowledge and intention should not be confused. Section 299 in defining first two categories does not deal with the knowledge whereas it does in relation to the third category. It would also be relevant to bear in mind the import of the terms likely would mean probably and not possibly. When an intended injury is likely to cause death, the same would mean an injury which is sufficient in the ordinary course of nature to cause death which in turn would mean that death will be the most probable result.

The distinction between culpable homicide amounting to murder and not amounting to murder is well known. Culpable homicide is genus, murder is its specie. The culpable homicide, excluding the special characteristics of murder, would amount to culpable homicide not amounting to murder. The Code recognizes three degrees of culpable homicide. When a culpable homicide is of the first degree, it comes within the purview of the definition of sec 300 and it will amount to murder. The second degree which becomes punishable in the first part of sec 304 is culpable homicide of the second degree. Then there is culpable homicide of third degree which is the least side of culpable homicide and the punishment provided for is also the lowest among the punishments for the three grades. It is punishable under the second part of sec 304 - *Kesar Singh v State of Haryana* (2009) 3 SCC (Cri) 1193.

[14] The mitigating factor for reduction of the charge will arise if evidence shows that there was a sudden fight as a result of some provocation by the victim or it's like to warrant so. It all depends on the facts and it is not something which can be expressed with certainty, as alluded by the Federal Court in *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, where Raja Azlan Shah FJ (as HRH then was) observed:

In the present appeal we think that in view of the nature of the injuries sustained by the deceased and the time and place of the incident, there was evidence of an intention on the part of the appellants to cause bodily injury to the deceased. Therefore in those circumstances, the fine distinction between ss 299 and 300 is very important and that point should have been put clearly to the jury in such a way that they would be able to come to a correct conclusion. The forensic practice of reading ss 299 and 300 to juries is likely to confuse rather than help. In view of what we have stated above, a case such as the present must therefore fall within the second part of s 299 or the third clause of s 300. Speaking generally, if the act must in all probability cause death, the offence is within s 300 of the Penal Code, and if the act is only likely to cause death, the offence falls within s 299 of the Penal Code. None of the exceptions to s 300 of the Penal Code were established. In ordinary circumstances we should probably have had little difficulty in upholding the convictions of the appellants for murder but in view of the nature of the medical evidence which we have touched on earlier, we felt the case might not unreasonably be brought within the lesser offence of culpable homicide not amounting to murder, falling within the first part of s 304 of the Penal Code. We have thought it necessary to deal with this matter at some length to ensure if possible that our finding shall not be construed as a declaration that in all cases such as the present the offence is culpable homicide not amounting to murder.

We set aside the convictions for murder, and substitute them with one under the first part of s 304 of the Penal Code read with s 34 of the Penal Code and sentenced each of the appellant to ten years' imprisonment effective from their dates of arrest.

[15] The learned deputy public prosecutor complains that it was wrong for the learned judge to conclude that Lobo had no intention to kill Murali just because Murali is the one who interrupted to save Raguram. And that too when

Lobo's defence was that he was not involved at all in the fight at the crime scene which resulted in the death of Raguram and Murali. In essence there was no evidence of any mitigating factor led by the defence to reduce to culpable homicide not amounting to murder.

[16] In this respect, we are in total agreement with submission of the learned deputy public prosecutor which reads as follows:

> It is our humble submission that the prosecution, in respect of the death of Murali, need not to prove 'an intention to kill' on part of Lobo against Murali. It is sufficient to prove that Lobo was the one who inflicted the injury at the back of the neck of Murali and he has the intention to cause that bodily injury and such injury is sufficient in the ordinary cause of nature to cause death.

[17] Support for the above proposition can be found in a number of cases which deals with ss 299 and 300 of the Penal Code.

[18] Basically s 299 deals with unlawful killing. For the killing to warrant the death penalty one of the criteria set out in s 300 must be satisfied for the accused to be punished under s 302 of the Penal Code which reads as follows:

> Whoever commits murder shall be punished with death.

[19] However, if the prosecution cannot satisfy one of the provisos to s 300 but it is an unlawful killing as set out in s 299 and the defence has placed a credible defence of aggravating and/or mitigating factors as opposed to denial or alibi, than the punishment will have to be lesser than that of death penalty and in almost all cases of serious nature the punishment will have to be under s 304 of the Penal Code or for lesser conduct or factor it may attract milder sentencing provision under the Penal Code.

[20] Only in cases where the defence succeeds in the defence of self defence as set out in s 96 of the Penal Code, the accused will be acquitted or in case of insanity the accused will be detained at the pleasure of the Yang Di Pertuan Agong as set out in s 348 of the Criminal Procedure Code, or lesser sentence when the defence succeeds on mitigating factors (eg grave sudden provocation) to reduce the charge to attract lesser sentence.

[21] When the defence is mere denial then there cannot be a finding of fact to reduce the charge to s 304 of the Penal Code. In cases where the defence is one of denial the issue will be only whether prosecution has established the required elements to sustain conviction and or sentence under s 302 of the Penal Code, failing which the accused has to be acquitted, applying the

maximum evaluation and beyond reasonable test as propounded by case laws (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281).

[22] The learned judge in reliance of the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 had reduced the charge and had attempted to give cogent reasons for doing so and learned counsel for the defence has captured it in the submission and it reads as follows:

> That the elements of s 300 limb (a) and (c) were satisfied in respect of the deaths of Raguram and Murali was similarly established at the close of the prosecution case. Although the defence case does not materially affect the court's findings at the close of the prosecution case, a consideration of the events in their totality has caused the court to re-appraised the mens rea element of the offence of murder in s 300.
>
> Lobo's act vis a vis Raguram, whereby Raguram was attacked and then stabbed in a vital part, namely his heart, falls within the ambit of the section in that the manner and circumstances of the attack show that Lobo took undue advantage of Raguram and acted in a cruel manner, warranting the attribution on an intention to kill.
>
> Such an intention is not so readily ascribed to Lobo's actions in relation to Murali, in that although again a vital part of Murali's body, namely his left carotid artery was severed in the attack, the chronology of events suggests that the attack on him was brought about by way of a response to his intervention in attempting to extricate Raguram. It is therefore not evident that Lobo intended to kill Murali when Murali intervened to protect Raguram. Given the instantaneous and spontaneous response of Lobo, it appears more correct to surmise from the sequence of events that by his actions he intended that Murali should be severely injured, but not necessarily that death be the most probable result of his attack. In accordance with the distinction between culpable homicide and murder as set out above in Tham Kai Yau's case, it appears that the act of Lobo in attacking and slashing Murali's neck more properly falls within the ambit of cupable homicide rather than murder.

[23] What is important to note here is that in *Tham Kai Yau*'s case the defence was not one of denial and/or alibi per se. In fact, the judgment in that case captures this issue as follows:

> As to the actual subject-matter of the charge, it cannot be disputed that the deceased was attacked by the appellants and probably one other armed with choppers and saw, at the time and place alleged by the prosecution and he died the same day as a result of multiple injuries he received. These facts were not controverted by the defence, and in fact they were proved beyond reasonable doubt by PW8, corroborated by PW9 and PW11, and the medical evidence.

[24] Even if *Tham Kai Yau*'s case the defence had been mere denial, as we said earlier the maximum evaluation and beyond reasonable doubt test now in vogue will not entail any form of jurisprudence to reduce the charge at the end of the prosecution or defence case when the defence is mere denial, according

to law or fact. In consequence we had no hesitation to conclude that appellate intervention is necessary on this issue.

DEFENCE APPEAL (B-05–145 OF 2008)

[25] Learned counsel for the defence contents the conviction is not safe. And complains that (a) the eye witnesses who gave evidence are related and/or close friends and in consequence are interested witnesses, (b) only SP2 says he was about 20 meters away and saw Lobo slash Murali and the other three witnesses who were very much nearer to Lobo at the time of the incident were not able to confirm so (c) there is a probability 'Bontal' or some other persons could have slashed Murali. That part of the submission, inter alia, reads as follows:

> From the evidence given by the eye witnesses, they have all stated that they saw the First Respondent at the scene of the crime. Only SP2 saw the First Respondent slashing Murali's neck.
>
> We submit that this eye witness (SP2) is an interested witness and his evidence should be corroborated by other witnesses.
>
> Even though SP2 was present at the time of the incident, but we submit that due to the circumstances and commotion at the place of the incident he might have wrongly recognize the real assailant.
>
> This is because of the following conditions:
>
> (i) The distance between SP2 and the deceased when the alleged incident happened is 20 meters.
>
> (ii) SP2 confirms during cross examinations and re-examination that there were many people surrounding Raguram when he saw Murali pull Raguram out from the crowd. This shows that the place of incident was crowded with other people (*tempat yang sesak*).
>
> (iii) SP2 agreed that he cannot identify the faces of 15-20 people who had surrounded Raguram because the place was dark (*tempat gelap*).
>
> We further submit that SP2 did not actually see that the First Respondent is the one who had slashed Murali's neck, as SP2 claimed; since SP2 himself admitted during cross examination as follows:
>
> S: Kalau Murali ada dipotong, pada masa menarik keluar Raguram awak tidak dapat nampak kerana tengok kearah lain?
>
> A: Setuju.
>
> Prosecution never challenged the SP2 evidence on this fact during re-examination. The learned trial judge also failed to direct her mind on this issue. The first respondent humbly submit that is it a major contradiction as it will determine whether SP2 really saw Murali being slash by the first respondent.
>
> On top of that, based on SP5 evidence, even though he cannot recall clearly what actually happen on that day but he confirm that he saw 'Bontal' (OKT1) running behind Murali holding a knife while Murali is holding his neck.

Therefore, there is a possibility that actually 'Bontal' (OKT1) who had slashed Murali's neck and not the first respondent.

Furthermore, SP3 who also knows the first respondent, but in his evidence he was unable to identify who actually slashed Murali although he witnessed the incident. There is a possibility that SP2 wanted to ensure that somebody takes the blame for the incident.

We submit that without independent witness corroboration, S02 (interested witness) evidence cannot be wholly accepted by the court. The need of caution and corroboration in accepting the interested witness evidence has been highlighted by the court in the case of *Magendran Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805.

[26] In the instant case four witnesses' evidence is most relevant to the issue of whether Lobo slashed Murali. They are SP2 – SP5. Their evidence can be summaried as follows:

(a) SP3 — Satish Gopal was Murali's cousin and he confirmed the fight and Lobo stabbing Raguram. After that he says that a person whom he did not see slashed Murali's neck (see p 1098). He was said to be standing about 5 meters away;

(b) SP2 — Pragash was Murali's nephew. During examination-in-chief he says he saw Raguram being beaten up but during cross-examination he says he actually did not see (p 1020). He maintained that he saw Lobo slashing Murali's neck from behind;

(c) SP4 — Satish says he saw Lobo hitting Raguram and stab him with a knife and also slashed him. And he was seven meters away. He confirms that he did not see Murali being slashed but only saw blood flowing from his neck; and

(d) SP5 — Datchinamoorthy was Murali's cousin brother. He said 'Bontal', 'Sivan' and one person by the name of Ambros were there with Lobo. And confirms Lobo stabbed Raguram but he saw Lobo only placing the knife at Murali's neck. And very importantly he says he saw Bontal running behind Murali and Bontal was running away with the knife.

WHETHER IT IS A SAFE TO CONVICT

[27] From the evidence of the witnesses, the evidence is consistent as to the cause of death of Raguram but for Murali only one witness confirm the slashing. And we must say the prosecution's failure to lead evidence through the other three witnesses whether they indeed saw Lobo slashing Murali and/or

causing the death of Murali will only show that the other three witnesses will not have witnessed the incident and in consequence cannot be corroborative of that issue.

[28] In addition, it must be noted that the learned judge had concluded the investigation by the investigating officer was shoddy (see pp 1039–1040). In the instant case nine suspects were arrested and only three were charged. From the evidence it appears more than three persons could have been involved in the killing of the victims. And the fact that 'Bontal' was seen running behind 'Murali' will also indicate that he may have slashed. However, 'Bontal' was acquitted at the prosecution stage and Sivan who was said to have killed Boy was acquitted at the end of the defence case, making it obvious that the other persons involved in the killing are at large.

[29] To compound the problem the four main witnesses are interested witnesses and SP2 is Murali's nephew. And the prosecution did not call any other independent witness even though on the fatal night there would have been no shortage of witnesses.

[30] All the above reasons as submitted by learned counsel for the defence will attract the jurisprudence relating to 'whether or not the conviction is safe'. Before dealing with that jurisprudence we must say that just because the witness is an interested witness that does not mean the evidence will be tainted and conviction cannot be sustained.

[31] In *Magendran Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, the Federal Court had this to say:

> It is clear to us that from her testimony she was an interested witness with a grudge against the appellant and had a prupose of her own to serve. In our judgment her evidence must be treated with caution and requires corroboration. In *Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40; [1969] 1 LNS 98, Raja Azlan Shah J (as His Highness then was) had this to say (at p 41) in respect of interested witnesses:
>
> > Testimony of close relations is not tainted if it is otherwise reliable in the sense that the witnesses and competent witnesses who were at the scene of the occurrence and could have seen what had happened. But if it is proved that they are not entirely disinterested witnesses, eg. They are either partisans of the complainant or are in any way inimical to the accused, then their testimony is tainted and requires corroboration if to be acted upon.

[32] The learned trial judge had given appropriate consideration to the issue of interested witness in the judgment and, inter alia, that part of the judgment reads as follows:

The fact that most if not all, the players knew each other because the events took place on an auspicious occasion in the vicinity of all these people's homes or the homes of their relatives, where they along with numerous other devotees had gathered for the night. Therefore the fact that the eye-witnesses knew both the victims and the three accused persons, per se does not automatically mean that their evidence is tainted with bias. In *Balasingam v Public Prosecutor* [1959] MLJ 193 it was said:

> After all there is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and in the surrounding circumstances.

And in the *Law of Crimes* by Ratanlal and Dhirajlal (2nd Ed), at p 1455 the following is said in respect of 'related witnesses':

> 'Related' is not equivalent to 'interested'. The term 'interested' postulates that the person concerned has some direct interest in the result of the litigation such as interest in decree in a civil case or in seeing that the accused is punished. A witness who is a natural one but relative of the victim cannot be termed as interested. Close relationship of witness to the deceased is no ground to reject his testimony if otherwise it is reliable. On the contrary, close relative of the deceased would normally be most reluctant to spare the real assailant and falsely implicate an innocent one. (*Kalki* AIR 1981 SC 1390).

It should also be borne in mind that the instant case related to separate murders. The eye-witnesses were related (some relatives) to Murali. They were not related to the two other deceased, Raguram and Boy, although they knew them. However they variously gave evidence not only of the wounds inflicted on Murali but also on Raguram and Boy. This is a further reason why their evidence simply cannot be rejected outright.

Apart from Satish — SP4, it was queried by the defence why no other witnesses who were not 'related' to Murali were produced. The fact that no other witnesses who the defence would view as 'independent' were produced does not detract from the duty of the court to examine the evidence before it in accordance with established judicial principles. The court could not conclude that because other witnesses who were not related to Murali were not called, the evidence of the eye-witnesses who were related to Murali had as of right to be viewed with suspicion.

Accordingly the evidence of these witnesses was considered, in like manner to that of other witnesses, by ascertaining their credibility and reliability by reference to their evidence, how they fared in the course of cross-examination and a consideration of their evidence in its entirety. The court also considered whether the four eye-witnesses did or could have conspired to give testimony against the three accused persons in this case.

[33] The learned trial judge had also discussed in length the issues raised by the defence in this appeal and that too in a comprehensive manner, making it

A difficult to interfere with the decision relating to the conviction. Upon analysing the evidence in totality and after much deliberation, we were unanimous in coming to the conclusion that the conviction is unsafe for the reasons adumbrated earlier which can be summarised as follows:

B (a) Only SP2 says he saw Murali being slashed and the other three witnesses were nearby and/or nearer than SP2 were not able to confirm the same;

(b) the issue of interested witnesses as well as the failure of the prosecution to call independent witnesses to confirm the same, is a factor which need to be considered, on the factual matrix of this case as there would not have been shortage of independent witnesses;

(c) the fact that Bontal was running behind Murali with a knife as well as the fact that more than three persons could have been involved in the killing and only Lobo was finally convicted for killing Raguram and Murali; and

(d) the shoddy investigation as well as the evidence to say Lobo in fact killed Murali when such evidence can be easily be forth coming from independent witnesses at the scene.

E In the Singapore case of *Yusof bin A Samad v Public Prosecutor* [2000] 4 SLR 58, it was stated:

> In addressing the question whether there was any failure or miscarriage of justice or whether a conviction was unsafe, the court will ask itself the subjective question of whether it was content to allow the verdict to stand, or whether there was some lurking doubt that an injustice had been done to the appellant.

[34] In our view whether it is a subjective or objective question or test it must in criminal cases be a decision where there is lurking doubt leans in favour of the accused.

[35] On the factual matrix of the case we find it unsafe to sustain the conviction substantially based on the testimony of SP2, in the absence of any independent witness or any other corroborative evidence to support the assertion that it was Lobo who slashed Murali and caused his death (see *Jandel Singh v State of Madhya Pradesh* (2003) 2 LRI 609).

[36] For reasons stated above we take the view that the conviction is unsafe and accordingly we allow the Appeal No B-05–145 of 2008 and dismiss prosecutions Appeal No B-05–154 of 2008 with a note that had we not allowed the accused's appeal we would have allowed the prosecution's appeal and convicted and sentenced the accused under s 302 of the Penal Code. In consequence we set aside the accused's conviction and sentence.

[37] We hereby order so.

Appeal allowed and conviction and sentence set aside.

Reported by Afiq Mohamad Noor